

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DALE SANDERS)	
Claimant)	
VS.)	
)	Docket No. 220,035
CARPET ONE CENTER)	
Respondent)	
AND)	
)	
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on March 17, 1997. The Order grants claimant's request for temporary total disability benefits and medical treatment.

ISSUES

The sole issue raised on appeal is whether claimant gave timely notice of accident as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the Administrative Law Judge should be reversed. The Appeals Board finds claimant did not give timely notice and has not demonstrated a just cause for the failure to give timely notice.

Claimant testified he began having problems with his back while working for respondent in early September 1996. He went to his family physician and was initially prescribed Tylenol. A week or two later he felt his back became worse while he was trying to scrape floors at the warehouse to get some of the old paint off. He went to his own doctor again, and this time the doctor prescribed muscle relaxants.

Claimant left his employment with respondent on October 7, 1996. The evidence indicates claimant did not inform his employer of a work-related injury before he left his employment. Coworkers and at least one person at the management level, Ronald D. Pore, knew claimant was having problems with his back, but claimant did not tell them it was work related. After leaving his employment with respondent, claimant worked at Raytheon for approximately two weeks. He was then off work for seven weeks and after that worked briefly for Nibarger Tool Service. Claimant acknowledges that he did not notify respondent his back problems were work related until sometime toward the end of November when he called Mikelle L. Frazier, the controller for Carpet One Center, to notify her he wanted to make a workers compensation claim.

Respondent argues that claimant has failed to give timely notice of accident as required by K.S.A. 44-520. Claimant argues that respondent has confused the requirement for notice of an injury with the requirement for notice of a claim being made. Claimant's argument suggests that the fact respondent was aware of back problems would, by itself, satisfy the notice requirement. Respondent, on the other hand, suggests claimant must give notice of intent to file a claim.

K.S.A. 44-520 actually requires notice of "accident." Where, as here, the injury has a gradual onset, it becomes more difficult to identify what constitutes notice of an accident. In our view, a claimant has given notice of an accident if he provides information which would reasonably make the respondent aware of the injury and of potential for a workers compensation claim. Notice of intent to file a claim is not required. On the other hand, notice of physical complaints is not generally sufficient unless, in context, the circumstances convey that the complaints are caused by the work activities.

The Board concludes that, under the circumstances presented here, the respondent's awareness of claimant's back problems does not satisfy the notice requirement. This is so in part because claimant advised respondent the back problems were not from the work for respondent. Two witnesses testified to this point. Mr. Pore, a vice president and secretary of respondent, testified that he saw claimant having some difficulties with his back at work and asked claimant if the problems were work related. Claimant indicated they were not and, in fact, attributed them to work outside of his employment with respondent. Ms. Frazier testified that she was uncertain whether she knew claimant was having back problems before he left employment. She did see him on respondent's premises sometime after he had gone to work for Raytheon. Claimant was wearing a special belt, and several people asked him the purpose of the belt. He advised it was to alleviate his back pain. Ms. Frazier testified that she then asked claimant if he

had a workers compensation claim against respondent. Claimant told her he did not. Ms. Frazier was in charge of handling workers compensation claims. She was the individual he eventually advised of his claim on November 26, 1996.

The Board also finds claimant has not established just cause for failure to give notice within ten days. Claimant worked as a manager, and the evidence indicates he was aware of the notice requirements. Claimant may have initially thought the back problem was a minor one which would resolve. However, he went to his own physician twice before he left respondent on October 7, 1996. The evidence indicates it became serious enough that notice should have been given.

WHEREFORE, the Appeals Board finds that the Order of Administrative Law Judge John D. Clark, dated March 17, 1997, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Jeffery R. Brewer, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director